

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

In re:

STANLEY CHILDRESS and
MELISSA L. CHILDRESS,

Debtor.

STANLEY CHILDRESS and
MELISSA L. CHILDRESS,

Plaintiff,

vs.

CHEVY CHASE BANK,

Defendant.

Case No. 99-15607-RGM
(Chapter 7)

Adv. Proc. No. 00-1122

MEMORANDUM OPINION

THIS CASE came on for trial on February 22, 2001. The debtors, alleging that the value of their condominium home is less than the principal balance due on the first trust, sought to void the second trust pursuant to §506 of the United States Bankruptcy Code.

Jurisdiction

This court has subject matter jurisdiction under 28 U.S.C. §§1334 and 157(a) and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. Under 28 U.S.C. §157(b)(2)(K), this is a core proceeding in which final judgments and orders may be entered by a bankruptcy judge. Venue is proper in this district under 28 U.S.C. §1409(a). All defendants have been properly served. The debtors and Chevy Chase Bank appeared, by counsel, at

trial.

Findings of Fact

Byron H. Howe testified for the debtors at the trial. He is licensed by the Commonwealth of Virginia as a general real estate appraiser. He is also a licensed real estate broker. He inspected both the interior and exterior of the condominium unit. He testified that the interior of the unit was in “below average” condition. The unit has a one bedroom and a den, although it is frequently marketed as a two bedroom condominium unit. At the time he conducted his appraisal, there had been 10 to 12 recent sales of comparable units. He evaluated the sales to determine those most comparable in size and time and concluded that the value of the condominium unit as of April 17, 2000, was \$50,000.00.

The bank’s appraiser did not testify, although his appraisal was admitted into evidence. Mr. Howe criticized the appraisal. Comparable Number 1 was a three-bedroom unit with two baths. The unit in question is a one-bedroom unit with den and one bath. Because of the number of comparable sales, Mr. Howe did not believe that it was appropriate to utilize a much larger condominium unit even though it was in the same condominium. The sales price of the three-bedroom condominium unit was \$72,500.00 which was significantly higher than the sales price of one-bedroom, one-den units. Mr. Howe further criticized the use of Comparable Number 3 which was based on a sales date of January 8, 1999. This was almost a year prior to the appraisal date of the bank’s appraisal, December 23, 1999. Because of the number of recent sales, Mr. Howe did not believe that it was appropriate to use an older sale. Finally, he criticized the use of Comparable Number 4. The bank’s appraisal stated that the sales price was \$57,500.00. In fact, this was the listing price. The property ultimately sold for a sales price of \$50,000.00. This sales price

is much more in line with Mr. Howe's ultimate opinion. He also noted that the bank's appraisal was a "drive-by" appraisal. The bank's appraiser did not enter the unit to inspect the interior and assumed that it was in average to good condition. Based on Mr. Howe's own inspection of the interior, he concluded that the property is in less than average condition. Based upon the testimony and the two appraisals, the court concludes that Mr. Howe's appraisal is more reliable and that the fair market value of the condominium unit as of April 17, 2000, was \$50,000.00.

Mr. Childress testified as to the current balance. He testified that the loan was placed on the property when he purchased it in October, 1994. The original principal amount of the loan was \$58,000.00 and the interest rate was 5.9%. It had an amortization period of 30 years. He testified that he was current with all payments to the first trust holder and that the principal balance was about \$57,300.00 which he obtained from a recent statement from the bank. The determination of the outstanding principal balance on an amortized mortgage can be computed mathematically. From the information given, the outstanding balance is in excess of \$52,000.00.

The court finds that the defendant's second trust is wholly unsecured.

Conclusions of Law

The Supreme Court held that §506(d) does not allow a chapter 7 debtor to "strip down" a creditor's lien to a judicially-determined value of the collateral. *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.E.2d 903 (1992). In *Dewsnup*, the Supreme Court was faced with a situation in which the subordinate lien holder was partially secured. Since *Dewsnup*, courts have struggled with the situation in which the subordinate lien holder is wholly unsecured. Two lines of cases have developed, the first

applies *Dewsnup* without regard to whether the subordinate lien holder is partially unsecured or wholly unsecured. The chapter 7 debtor is unable to affect the subordinate lien holder's lien in any way. The second line permits a chapter 7 debtor to void a subordinate trust if it is wholly unsecured.

There is no controlling precedent from the Court of Appeals for the Fourth Circuit. However, there are two opinions from the United States District Court for the Eastern District of Virginia. *Yi v. Citibank (Maryland), N.A., (In re Yi)*, 219 B.R. 394 (E.D.Va .1998) (Ellis, J.) clearly adopts the second approach. The second opinion is *Hoekstra v. United States, (In re Hoekstra)*, 255 B.R. 285 (E.D.Va. 2000) (Lee, J.). In *Hoekstra*, the District Court appears to have adopted the *Yi* analysis. However, in *Hoekstra*, the Internal Revenue Service was secured not only by a subordinate lien on the debtor's real estate but also a lien on personal property. When the personal property was taken into account, the Internal Revenue Service was not wholly unsecured. Consequently, *Yi* was not applicable to the facts of that case.

Based upon the precedent from the District Court, this court concludes that the chapter 7 debtor may void the second trust lender's lien because it is wholly unsecured.

February 22, 2001
Alexandria, Virginia

Robert G. Mayer
United States Bankruptcy Judge

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